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Supreme Court of the United States.

October Term, 1900.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
Petitioner,

vs.

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

HERBERT B. TURNER,
JOHN G. JOHNSON,
J. S. FERGUSON,
Solicitors and of Counsel for Petitioner.

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To the Honorable the Justices of the Supreme Court of the United States:

The petition of The Farmers' Loan and Trust Company, a New York corporation and citizen of said State, respectfully represents to your Honors as follows:

This is an application for a writ of certiorari to the United States Court of Appeals for the Third Circuit, which reversed by a vote of two to one a decree of the United States Circuit Court in the above entitled cause. As will appear, two Judges, Judge Buffington, sitting in the

Circuit Court, and Judge Acheson, sitting in the Court of Appeals, have sustained the contentions of the petitioner, but Judge Gray and Judge Dallas, sitting in the Court of Appeals, have taken the opposite view and have ordered the reversal of the decree of the Circuit Court. Moreover, the Court of Appeals, after full argument, before rendering any decision, and after having the case under consideration for a number of weeks, ordered a re-argument of the case of its own motion. These facts, it is submitted, go far to show that the case is one of gravity and importance and that the petition should be granted.

STATEMENT.

On January 1st, 1891, the Pennsylvania Plate Glass Company, a Pennsylvania corporation, made a mortgage to Petitioner to secure bonds amounting to $250,000, to foreclose which the original bill herein was filed. The mortgage covered the working plant of the Mortgagor Company in Irwin, Pennsylvania, with certain contracts and other property, real and personal, then owned or thereafter to be acquired, including rents, issues and profits (Rec. Vol. 1, pp. 18 to 39). The defendants named in the original bill included the above-named respondents and the Pennsylvania Plate Glass Company, the Mortgagor Company.

Before the foreclosure and in March, 1894, a suit was brought in the Court of Common Pleas of Westmoreland County, Pennsylvania, at the instance of the directors, against the Pennsylvania Plate Glass Company to procure its judicial dissolution, and Joseph W. Stoner was appointed Receiver. In that suit an order was subsequently made for the sale of the property by the Receiver *subject to the lien of the said mortgage for two*

hundred and fifty thousand dollars. Accordingly, June 18, 1894, the Receiver sold the property so subject at public auction. The property, it will be noted, was not sold subject to any possible claim which might be proved to exist, but to this particular mortgage for this specified amount of two hundred and fifty thousand dollars fully described in the terms of sale. The defendant, W. L. Kann, became the purchaser, the price being only $37,500, and in pursuance of this sale a deed was by order of the Court given July 2d, 1894, by the Reciver to Kann. The deed distinctly and in accordance with the express terms of the order recited that the conveyance was made " *subjected to a mortgage made by the said Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for Two hundred and fifty thousand dollars ($250,000), dated Jan. 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1.*"

Mr. Kann paid the interest on all the bonds represented by the coupons which fell due July 1, 1894, and January 1, 1895 (Rec., Vol. pp. 69 to 71). These were the last coupons paid, for on the first of July, 1895, a new company, the respondent, the Penn Plate Glass Company, was organized by Mr. Kann to receive a deed of the property from him, and to carry on the business, and that company, or rather Kann, its president acting in the name of that company, deliberately permitted the coupons falling due on the same day to be defaulted. The fact that this new company took a name calculated to confuse parties with whom it might deal and make them suppose that it was in fact the Pennsylvania Plate Glass Company, writing the first word of its name with the customary abbreviation, will readily appear to anyone. The Penn Company never paid a cent of interest upon

10 the bonds, although the deed given to it by Kann July 1, 1895, the very day of the first default, expressly recited, as did the deed to Kann himself, that the conveyance was made "*subject to a mortgage made by the Pennsylvania Plate Glass Company to the Farmers' Loan and Trust Company of the City of New York for Two hundred and fifty thousand dollars ($250,000), dated January 1, 1891, recorded in Westmoreland County in Mortgage Book 43, page 1.*"

Defaults being made in the payment of coupons, the Trust Company served written demands for their payment upon the defendants, the Pennsylvania Plate Glass Company, W. L. Kann, the Penn
11 Plate Glass Company and Joseph W. Stoner, Receiver. (Rec., Vol. 1, pp. 126, 127.) Six months having elapsed and these defaults still continuing, the Trust Company, still following the terms of the mortgage, by written instruments declared the principal of the bonds to be due and payable (Complainant's Ex. 3, Rec., Vol. 1, p. 72), and two days later, July 8, 1896, it filed its original bill for the foreclosure of the mortgage.

No defense was made by the Mortgagor Company, but the respondent Kann, who had bought the property subject to the mortgage, for only $37,500, and had organized the new Company as
12 aforesaid, and also the new company so formed, both saw fit to defend the suit and filed demurrers.

On their demurrers being overruled, they filed a joint and several answer. (Rec., Vol. 1, pp. 45 to 58.) This was done by the same attorneys. Whether Kann in this litigation acts in his own name or in the name of the Penn Plate Glass Company, he acts through the same attorneys.

In July, 1896, at the beginning of the foreclosure suit, *the complainant made a motion for a receiver.* It was a trustee without funds, the bond-

holders were scattered, the mortgagor corporation 13
was insolvent, the property was in the possession of the respondent, the Penn Plate Glass Company, hostile to the mortgage interests, and the principal of the mortgage, being $250,000, had matured as well as some instalments of interest. No doubt the Court below would have granted this motion had it not been for the strenuous opposition made by the two re-respondents. The receivership was desired, among other things, for the purpose of protecting the property from loss by fire, and the danger of such loss was strongly urged upon the Court as a ground of its taking possession of the property and effecting insurance for the benefit of whom it might 14
concern. Whether the parties in possession of the property were bound to insure for the benefit of the bondholders, made no difference whatever. When the Court took possession of the property, as it surely ought to have done, it would become its duty to protect the property for the benefit of whom it might concern, and the failure of the Court below to perform this, its evident duty, resulted in a loss of the greater part, if not all, of the bonded indebtedness.

For, on April 12, 1898, while the respondent, the Penn Plate Glass Company, remained in possession of the property and was obstructing the decree of 15
foreclosure and sale, which has since been entered, (and the fact that, so far as the decree ordered foreclosure and sale it is correct is admitted by all parties), the greater portion of the mortgaged property was destroyed by fire. The respondents had continued to refuse to insure for the benefit of the bondholders, although the trustee, your petitioner, had repeatedly demanded that they should do so. On the contrary, they insured the property for the benefit of the Penn Plate Glass Company to the amount of some

three hundred and fifty or four hundred thousand dollars, so that if none of this insurance can go to the bondholders, the respondents are absolutely benefiting by the fire to the extent of the mortgage.

It is fair to state that when these respondents effected this insurance, they caused the insertion in each policy of a provision to the effect that the property was subject to a bonded indebtedness of $250,000, and that it was to be understood that the insurance did not cover the interest of the bondholders. But this provision was, of course, simply an agreement between the insurers and the insured, and in view of the fact that the insurance companies paid over the insurance moneys to the receiver of the U. S. Circuit Court, appointed for that purpose in this cause, that provision has nothing to do with the issues in the present case. Moreover, that clause was an admission by the respondents of the validity of the mortgage and the amount of the bonded indebtedness, by denying which thereafter, for the purpose of obstructing the foreclosure, they succeeded in delaying the sale, and thus caused the loss to the bondholders to arise.

This property, being insured to an amount equal to its entire value, and being mortgaged for $250,000, is destroyed by fire, and in its stead remains its entire value in insurance money. The petitioner claims that it is entitled to a decree, such as was rendered by the trial Court below, to the effect that any deficiency that might be found after the sale of what little is left of the mortgaged property, should be paid out of the insurance funds.

If the decision of the Court of Appeals stands unreversed, the Penn Plate Glass Company will profit to a very large extent at the expense of the bondholders by reason of this fire, which will to them a mort fortunate catastroyhe. Kann

bought the property for $37,500, expended, as he 19
claims, money upon it to increase its cost to him to not more than $83,500, at which last figure the conveyance was made to the Penn Company. Subsequently the Penn Company made improvements, so that the cost to it amounted to $118,000 (Record, Vol. 1, p. 483). This property the Penn Company insured for some $450,000, and it proposes to collect the insurance without paying the bonds!

After the fire took place the petitioner hastened to file its supplemental bill making the insurance companies parties defendant, the object being to impress the lien of the mortgage upon the insurance fund. (Rec., Vol. 2, pp. 3 to 24.) Demurrers 20
of the respondents were overruled (Rec., Vol. 2, pp. 24 to 35) and thereupon the respondents answered. (Rec., Vol. 2, pp. 35 to 45.) Replication was filed and testimony taken on both sides. A receiver of the insurance moneys was appointed by by the Court.

The final decree was rendered July 25, 1899, by the Hon. Joseph Buffington, District Judge. (Rec., Vol. 2, p. 187.) This decree ordered the foreclosure of the mortgage and a sale of the property unless the bonded indebtedness should be paid within a short day, and made reference to a Special Master 21
to ascertain and report which of the bonds were entitled to the security of the mortgage, etc., and whether the sale of the property as an entirety, &c., and the decree further held that the trustee complainant was entitled to an equitable first lien upon the insurance moneys to the extent of all the valid outstanding bonds secured by the mortgage, etc.

The District Judge filed an able and elaborate opinion sustaining the decree in favor of the complainant. The present respondents appealed and

22 the decree of the Circuit Court was reversed by the action of Judges Gray and Dallas, Judge Acheson dissenting. There is, therefore, an equal division of opinion between the Judges who have passed upon the questions affecting the insurance moneys in this case, Judges Buffington and Acheson sustaining our position, and Judges Gray and Dallas opposing it, the action of these latter Judges, however, controlling the Court of Appeals so that we come before this Court with a decree reversed, to argue for a writ of *certiorari*.

The original decree should be sustained, and the action of the Court of Appeals should be reversed
23 for the following reasons :

I.

There was a covenant on the part of the mortgagor to insure whenever required by the trustee of the mortgage. The latter made such requirement. Such insurance was necessary for the benefit of the trustee. It was an equivalent for the insurance which at its option the trustee might take out itself. Of course, it would not have taken out such insurance for the benefit of the mortgagor. It
24 would have been folly to have stipulated for the taking out of insurance by the mortgagor in its own name when the mortgage provided that there would be no personal liability for the payment of the mortgage debt by the mortgagor in favor of the bondholders.

II.

The conveyance to the Penn Plate Glass Company being "subjected to the mortgage" imposed upon the grantee the duty to indemnify the mort-

gagor, the Pennsylvania Company, against all liability upon the covenants of the mortgage. The Penn Plate Glass Company therefore became bound to indemnify the mortgagor against damages by reason of the breach of the covenant by the latter to insure when required. 25

III.

Inasmuch as the Penn Plate Glass Company did insure in pursuance of its duty so to do by way of indemnification of the Pennsylvania Company, the fund resulting from the proceeds of such insurance is impressed to such an extent as is necessary to indemnify the mortgagor with the duty of such indemnification. The mortgagor would be entitled to sue the Penn Plate Glass Company because of its failure to take out insurance if none had been taken out. The insurance having been taken out by the Penn Plate Glass Company, in pursuance of its duty, a Court of equity will not turn the Pennsylvania Company over to an action at common law for breach, but will impound the insurance money resulting from the performance of the duty incumbent upon the grantee. 26

IV. 27

The fund arising from the insurance being impressed in equity with the duty in favor of the mortgagor to indemnify, the latter under its covenant to insure is subject to the right on the part of the morgagee to enforce as against the fund the duty incumbent upon the mortgagor, namely, to appropriate it in relation to the covenant to insure.

As between the mortgagor and the Penn Plate Glass Company, the latter is the principal in the

28 obligation to insure, and the former the surety. The person entitled to performance of the covenant, *i. e.*, the trustee of the mortgage, has a right to demand the appropriation for its benefit of the fund which is collateral security for the obligation of the title.

Equity avoids circuity of action, and if it appears that a fund is charged with a duty, it will enforce that duty for the benefit of everybody directly or indirectly entitled to compel performance.

V.

29 Apart from the above propositions the Penn Plate Glass Company became bound to insure by virtue of its retention of possession of the premises.

A default occurred which entitled the trustee to demand possession. Such possession was demanded. Had it been given, insurance could have been effected out of the income, rents, etc. It became the duty of the Penn Plate Glass Company in consequence of its continued occupancy and deprivation of the trustee of its right of occupancy, to appropriate the income to an insurance of the premises. Had it used the income in procuring the
30 insurance, the latter would have been stamped with a trust in favor of the trustee. The fact that it is impossible to trace the income directly into the purchase of the insurance does not deprive the mortgagee held out of possession, of its right, where insurance was taken out, to insist that it became entitled thereto because of the duty to insure.

It may further be added that inasmuch as the Court below refused to take possession and appoint a receiver and was induced to take such course by vigorous opposition to the motion made

by the Penn Plate Glass Company, that company must be considered as in the position of a receiver in possession and charged with the duty of effecting insurance. 31

When the receivership was denied, the Court below exacted a bond from Kann and Wertheimer to the effect that if it was the duty of the Penn Plate Glass Company to insure, the insurance should inure to the benefit of the trustee of the mortgage. It was a positive agreement by these men that out of the proceeds of any insurance money which should be collected, the bonds could be paid. Had the Penn Plate Glass Company itself thus agreed, there would be no doubt of its duty to appropriate the insurance for the benefit of the trustee. 32 Though Kann and Wertheimer made the covenant, which was that the bonds should be paid out of the insurance fund of the Penn Plate Glass Company, the latter Company obtained the benefit of this fund and thereby became unquestionably estopped from denying the right of the trustee to appropriate the insurance money, if there was a legal duty upon the Penn Plate Glass Company to insure.

The condition was not merely if it was its duty to insure under the mortgage but also under the deed to it. We have already shown that there was such duty. It follows that the insurance 33 money should be impounded.

Your petitioner avers that it is advised by counsel that the questions arising in this litigation are of very great importance, so important, indeed, that they should, as your petitioner respectfully submits, obtain from your Honors a review of the said decision of the said Circuit Court of Appeals for the Third Circuit by and on certiorari; that such hearing on certiorari of this cause is essential and is specially proper in view of the fact, as above stated, that there is an equal division in

34 opinion between the four Judges of the Courts to which this cause has been submitted for determination. This application has been prosecuted with all possible diligence, inasmuch as the decision of the Honorable Circuit Court of Appeals for the Third Circuit, of which your petitioner seeks to obtain a review by certiorari, was not rendered by said Court until after the adjournment of this Court for the October Term of 1899, so that the decree of said Circuit Court of Appeals did not become final until after the adjournment of this Honorable Court.

That owing to the inability of your petitioner to present this application to your Honors immedi-
35 ately upon the reversal of the decree of the Circuit Court by the said Appellate Court, for the reason that this Honorable Court was in vacation at that time, the mandate of said Honorable Circuit Court of Appeals for the Third Circuit has issued to the Circuit Court of the United States for the Western District of Pennsylvania, and petitioner therefore desires that said mandate be recalled as hereinafter prayed for.

Your petitioner files herewith a copy of the opinion of the Circuit Court of Appeals, a copy of the dissenting opinion of the Honorable Judge Ache-
36 son, a copy of the opinion of the Honorable Judge Buffington filed on the rendering of the decree of the Circuit Court, and also copies of the record and of the brief filed by your petitioner in the Court of Appeals.

Wherefore your petitioner prays that a writ of certiorari may issue to the said Honorable The Circuit Court of Appeals for the Third Circuit, to bring up for review before your Honors the judgment and decree of said Court in the cause entitled The Penn Plate Glass Co. and Wm. L. Kann, appellants vs. The Farmers' Loan and Trust Com-

pany, Trustee, Appellee, Number on the docket 37
of said Honorable Court, and that your Honors will issue an order directing the said Honorable Circuit Court of Appeals to recall its mandate, and to hold the same subject to the orders and decrees of this Honorable Court and until your Honors can hear and pass upon such writ of certiorari; and your petitioner prays that upon the hearing of said writ of certiorari, so to be issued, your Honors do quash and reverse the decree of said Circuit Court of Appeals for the Third Circuit, and do render a decree that the decree of the United States Circuit Court for the Western District of Pennsylvania in the cause aforesaid be affirmed with costs, and that your petitioner shall have such 38
other and further relief in the premises as may be just.

Respectfully submitted,

HERBERT B. TURNER,
JOHN J. JOHNSON,
J. S. FERGUSON,
Solicitors and of Counsel for the Petitioner.

STATE OF NEW YORK, *County of New York*, } ss.:

Personally came and appeared before me, the 39
undersigned authority, Edwin S. Marston, who being duly sworn, deposes and says, that he is the President of the Farmers' Loan and Trust Company, the petitioner in the above petition, and that all the facts, matter and things therein set forth are true to the best of his knowledge, information and belief.

E. S. MARSTON.

Sworn to and subscribed before me this 16th day of October, 1900.

W. B. CARDOZO,
[SEAL.] Notary Public No. 18,
New York County.